No. 16409

IN THE

United States
Court of Appeals
For the Ninth Circuit

MYRON E. McPHERSON,
Appellant,

vs.

AMALGAMATED SUGAR COMPANY,
a corporation,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court
for the District of Idaho,
Southern Division

HONORABLE FRED M. TAYLOR, Judge

BRUCE BOWLER
244 Sonna Building
Boise, Idaho
Attorney for Appellant

CLEMONS, SKILES & GREEN
517 Idaho Building
Boise, Idaho
Attorneys for Appellee

Clerk

Filed

No. 16409

IN THE

United States
Court of Appeals
For the Ninth Circuit

MYRON E. McPHERSON,

Appellant,

vs.

AMALGAMATED SUGAR COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court
for the District of Idaho,
Southern Division

HONORABLE FRED M. TAYLOR, Judge

BRUCE BOWLER
244 Sonna Building
Boise, Idaho
Attorney for Appellant

CLEMONS, SKILES & GREEN
517 Idaho Building
Boise, Idaho
Attorneys for Appellee

..... Clerk

Filed .....

INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

RULES

No. 16409

IN THE

United States
Court of Appeals
For the Ninth Circuit

MYRON E. McPHERSON,
Appellant,

vs.

AMALGAMATED SUGAR COMPANY,
a corporation,
Appellee.

BRIEF OF APPELLANT

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

This is an action to recover damages for personal injuries. Appellant's Complaint (T.R. 3-4) alleges jurisdiction in the District Court under United States Code, Title 28, Section 1332, as amended based upon diversity of citizenship by appellee corporation being a citizen of Utah, and appellant being a citizen of Idaho, and the amount in controversy, exclusive of interest and costs exceeds $10,000.00. (T.R. -4).

The District Court had jurisdiction under 28 U.S.C. Sec.1332 (a) (1). This Court has jurisdiction of the appeal under 28 U.S.C. Sec. 1291.

II

STATEMENT OF CASE

This action was brought by Myron E. McPherson, appellant, a former way maintenance employee of Union Pacific Railroad Company, at Gooding, Idaho, against Amalgamated Sugar Company to recover damages for loss of his right arm. He was injured on November 13, 1956, at the railroad yard in Gooding, Idaho, when he was struck down from the back by a gondola freight car which was fully loaded with sugar beets heaped high above the top of the car and set in motion by a pinch bar on an inclined track by an employee of appellee sugar company who operated the car on the inclined track for spotting in the railroad yard where appellant was working as a section crewman. Which operation and driving of the car was without a locomotive, the movement being by gravity of the loaded car. The operator mounted the brake platform on the easterly end of the car, which was moving westerly, with his vision of the track ahead of him completely obscured by the load of beets. This negligent operation of the beet car through the railroad yard, where section men were working, caused the car, quietly and without warning, to run down and strike the appellant in the back, knocking him down between the two rails and his right arm was caught between the southerly rail and

the southwesterly wheel of the car, crushing the same to require amputation at the shoulder. (T.R. 4-5)

On May 13, 1957, an action was filed, in the Federal District Court for Idaho, Southern Division, by McPherson against Union Pacific Railroad Company for $375,000.00, under the Federal Employers Liability Act, alleging railroad's employers liability for negligent use of its equipment and safe place to work failure. (T.R. 10-14) The railroad answered, denying liability and alleged the responsibility for the movement of the beet car was that of the Amalgamated Sugar Company. (T.R. 15-16) This case was tried to a jury, and by verdict filed September 14, 1957, McPherson was awarded $35,600.00 damages against the railroad (T.R. 18-19), and judgment was entered on the verdict for McPherson on September 14, 1957, for $35,600.00 and interest at the rate of 6% per anum from September 14, 1957 and for costs, against the railroad. (T.R. 19-20)

On November 12, 1958, McPherson, the appellant, filed this action against Amalgamated Sugar Company for $338,000.00, as the balance of his damages unrecovered from the railroad company. (T.R. 3-7)

On November 28, 1958, a motion to dismiss was filed by appellee Amalgamated Sugar Company on the grounds that the complaint failed to state a claim upon which relief could be granted. (T.R. 7) Filed with the motion, in support thereof, was the affidavit of Dale Clemons, attorney for Amalgamated Sugar, reciting facts about the appellant's case against Union Pacific Railroad (T.R. 8-9), together with a copy of the complaint in that action, (T.R.

10-14), the answer of the railroad company (T.R. 15-17, and instruction (T.R. 17-18), the verdict (T.R. 18), the judgment (T.R. 19-20), and the satisfaction of judgment. (T.R. 20-21)

The satisfaction of judgment was made on March 20, 1959, when the amount of the judgment was $37,027.09, and it recited that Union Pacific Railroad Company had paid $36,460.50, and acknowledged satisfaction of the judgment against the railroad on that compromise basis. (T.R. 20-21)

A principal question involved in this appeal is the effect of this satisfaction of judgment against the railroad and its operation in favor of the appellee, and the issue is raised by the motion to dismiss. Appellee contends that the satisfaction of the partially paid judgment against the Union Pacific Railroad, would relieve it from any liability, and appellant contends it would not bar action against Amalgamated Sugar Company.

On this issue the District Judge made his order, on December 31, 1958, on the motion to dismiss which, by request of counsel for appellee, he treated as one for summary judgment. (T.R. 22) He recited in his order that "the judgment obtained in the railroad case was fully satisfied," and although it may be that "the plaintiff reduced the interest," he "received full payment for the damages awarded by the jury." (T.R. 23) Thus the court held that interest is not part of the judgment. The District Judge further ruled that "we do not have a situation of partial satisfaction of a judgment against one of the joint tort-

feasors." (T.R. 24)

Then the District Judge ordered that the motion of the defendant (to dismiss) be and was granted. (T.R. 25) On January 6, 1959, judgment was entered which recited that the matter came on before the Court on "Defendant's Motion for Summary Judgment, * * * it is the determination of this court that the motion for summary judgment is well taken, and the defendant is entitled to a judgment of dismissal." Following which the Court ordered, adjudged and decreed the action, "dismissed with prejudice." (T.R. 26)

Another principal question is presented by the granting of the motion to dismiss when being treated as a motion for summary judgment. Appellant contends that the motion to dismiss should not have been granted.

III

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that the judgment against the railroad had been fully satisfied.

2. The District Court erred in holding that accrued interest was not part of the judgment obligation.

3. The District Court erred in holding that the satisfaction made was not a partial satisfaction of a judgment against one of joint tort-feasors.

4. The District Court erred in ordering that the motion to dismiss be granted.

5. The District Court erred in entering a judgment of dismissal with prejudice, after the motion was treated as one for summary judgment.

SUMMARY

A.

Partial payment in fact of a judgment against one of two joint tort-feasors, with all the consideration being furnished by the judgment debtor, a satisfaction by the judgment creditor of the judgment on the compromise basis, short of full payment, will not operate to discharge the other tort-feasor who furnished no consideration and was not intended to be released. The injured party can proceed against the other tort-feasor with a credit to his damage of the amount paid for the satisfacion.

B.

As the motion to dismiss under Rule 12 (b) was treated as one for summary judgment as if under Rule 56, it was error to grant the motion to dismiss and not enter a summary judgment.

ARGUMENT

A.

The judgment against the railroad (T.R. 19-20) provided for recovery of $35,600.00, with interest at 6% per annum from September 14, 1947, and costs, and such interest and costs became a legal incident of the judgment, and a substantive part of the judgment obligation, which

would require payment for full satisfaction. The amount due on the judgment at the time of the satisfaction was $37,027.09 on March 20, 1958, and the time for appeal had not expired when the compromise settlement of $36,460.50 was made, thus the full judgment obligation was not in fact paid. (T.R. 20-21)

In *Hall vs. Citizens' State Bank of Superior*, Neb. 1932, 241 N.W. 123, the Supreme Court of Nebraska held:

> "This court has indicated and by the great weight of authorities it seems impossible to separate the judgment and interest accruing thereon. Such interest is a part of the judgment itself for which execution may issue upon request."

Although courts seem to differ in terminology as to whether interest is an actual part of the judgment, some saying it is, and some not, there is no authority that interest is not a legal incident of the judgment and part of the obligation involved in full satisfaction.

This elementary rule was succinctly stated in the early case of *Fitzgerald vs. Caldwells Executors*, Pa. 1802, 4 U.S. 251, wherein it was held:

> "Interest is, therefore, generally speaking, a legal incident of every judgment."

The Fitzgerald case recognized that the right may be suspended by agreement of the parties, and such occurred when this appellant satisfied the judgment against the railroad less full payment of the judgment obligation, and although the railroad was entitled to such satisfaction of the judgment, this could not operate to relieve appellee

of its liability as joint tort-feasor as no part of the consideration for the contractual satisfaction had been supplied by appellee.

Satisfaction for partial payment of the obligation of a judgment against one of two joint tort-feasors will not operate to discharge the other even though the unpaid portion was accrued interest on the judgment. A leading case of *Lovejoy vs. Murray*, 1865, 3 Wall. U.S. 1, holds:

> "We are therefore of the opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not a party to the first judgment."

Stusser vs. Mutual Union Ins. Co., 127 Wash. 449, 221 Pac. 331 (1923), holds:

> "It seems to us that it is also a well-settled general rule of law that a partial release by the injured party of one or more joint tort-feasors has no greater effect than releasing the other joint tort-feasors pro tanto, and that to whatever extent such expressly released joint tort-feasors remain liable to the injured party, so will the other joint tort-feasors remain liable to the injured party. There are decisions seeming to recognize exceptions to this general rule; but, where the amount of the injured party's damages, as against all the joint tort-feasors, has become fixed by judgment before the execution of such partial release, as in this case, no exception to this general rule obtains. 23 R.C.L. 405. Counsel for the insurance company seem to rely upon our decision in Larson v Anderson, 108 Wash. 157, 182 Pac. 957, 6 A.L.R. 621, as lending support to their contention that the acceptance of pay-

ment from the owners of the truck and the release of the judgment as against them to the extent of $5,-336.80 by appellants was in legal effect an entire release and satisfaction of the judgment as against the insurance company. But the argument, we think, overlooks the fact that that was only a partial release and satisfaction of the judgment as against the owners of the truck; they remaining still bound to pay the judgment in so far as it remained unsatisfied."

In this Ninth Circuit Court of Appeals is found good authority for the appellant's right to prosecute this action; and in *Huskey Refining Co., vs. Barnes*, 119 F (2d) 715 (C.A. 9, 1941) where Union Pacific Railroad had been released by a workman under Federal Employers Liability, it is held: (Release and compromise satisfaction of judgment are comparable)

"A further point under this head remains to be considered. In the case of Young v Anderson, supra, the Idaho Court, speaking through Judge Rice, said that, whether the tort-feasors be joint or independent, the injured party is entitled to no more than compensation for his injury; and that consideration received from one, for the release of any claim against him, operates to reduce pro tanto the amount recoverable from the other. That, of course, is the rule generally."

The case of *Young vs. Anderson*, 33 Ida. 522, 196 Pac. 193 (1921) holds:

"Since, however, appellant was only entitled to receive compensation for his injuries received, the consideration received from the Boise Valley Traction Company for the release of any claim against it operated to reduce pro tanto the amount of any damages

he was entitled to recover against any other tort-feasor responsible for his injuries, and this is true whether the tort-feasors be joint or independent. The release, therefore, was admissible in evidence."

Friday vs. United States, 239 F (2d) 701, (C.A. 9, 1957) reversed a summary judgment for the defendant where plaintiff had received partial payment for his damages received in an automobile collision, by holding:

"In a case involving tort-feasors, the Idaho Court has held that a release of one releases the other only where the release purported by its terms to indemnify the plaintiff completely for his loss. The Court stated the rule by quoting a California case involving 'joint tort' feasors as follows:

'The applicable law is thus conclusively stated: Even if it were to be conceded that the City of Los Angeles was a joint tort-feasor with these appellants and that same liability rested upon it as such for her injuries, it is well settled rule that before one joint tort-feasor can be held to be discharged from liability through the release of another, the consideration for such must have been accepted by the plaintiff *in full satisfaction* of the injury. (emphasis added) * * * Wallner v Barry, 207-Cal-465, 279-Pac-148 at page 151.'

"Valles v Union Pacific Railroad, 1951, 72-Ida-231, 239, 238 P2-1154, 1159. It was unnecessary in that case to apply this rule to joint tort-feasors, since the case involved independent tort-feasors, and the Court expressly stated that it held 'neither way * * * as to joint tort-feasors."

"The above dictum of the Valles case, citing the

California rule that the injuries themselves shall be fully compensated in both independent and in joint negligence settlements of claims was preceded in another Idaho case by an even more striking dictum in a separate tort-feasor case, stating that in both separate and joint tort-feasor cases the settlement with one reduces the liability of the other only to the extent of the amount paid. In Young v Anderson, 33-Ida-522, at page 524, 196-P-193 at page 194, 50-ALR-1056, the Court stated:

> 'Since, however, appellant was only entitled to receive compensation for his injuries received, the consideration received from the Boise Valley Traction Company for the release of any claim against it operated to reduce pro tanto the amount of any damages he was entitled to recover against the other tort-feasor responsible for his injuries, and this is true whether the tort-feasors be joint or independent.'

"We are more impressed that these dicta state the law of Idaho by the following language of the Court in the Valles case in concluding its opinion in 72-Idaho at page 240, 238-P2 at page 1160:

> 'Too many courts in maundering on this subject have made such a fetish of the pat phrase "there can be but one recovery for a tort" they have lost sight of and ignored *the fundamental factor in even-handed justice that it is as imperative that the tort claimant shall receive full compensation* (emphasis added), as it is that the tort-feasor shall not pay twice or more than the *full* award determined judicially or otherwise, as a unit or piecemeal.'

"This language accords with Wigmore's statement

> of the rule that a release to one of several joint tort-feasors is a discharge to all is merely a 'surviving relic of the Cokian period of metaphysics'."

This Friday case remains the rule of this jurisdiction although there are different rules elsewhere.

In *Garvin vs. Osterhaus*, 125 F. Supp. 729 (U.S.D.C. Conn., 1954), the court in holding motions for summary judgment should be overruled where there was no showing that judgment on the merits had been fully paid, said:

> "The defendant's naked allegation that plaintiffs received a 'substantial sum of money' in settlement at the time of plaintiffs motions to dismiss the other defendants, with prejudice, does not establish that plaintiffs' causes of action have resulted in judgment and satisfaction, and therefore bar to plaintiffs' claims against the instant defendant."

Satisfaction and release of rights against joint or concurrent tort-feasors rests in contract which requires consideration moving from the one asserting the satisfaction or release, and depends upon intention of the parties. *Skut vs. Hartford Accident & Indemnity Co.*, 142 Conn., 398, 114 A (2d) 681 (1955) holds that for partial satisfaction of a judgment to be treated as full satisfaction as to other tort-feasors, such must appear to be the intention of the parties.

The satisfaction of appellant was drawn to show it was not full payment of the judgment obligation and specified the exact amount received and from whom with intent to preserve and not to relinquish rights against the other tort-feasor, appellee here. (T.R. 20-21) These facts were known

and understood between appellant and the railroad which supplied all the consideration for the satisfaction and release of liability on the judgment against it, and the railroad had failed in its eforts to get the appellee to participate by contribution of funds, as it considered the appellee responsible for the operation of the car causing the injuries. (T.R. 15-16) Judgment existed against the railroad and any settlement would entitle it to record of satisfaction, but anything short of full payment of the judgment could not operate under the rules of the law to relieve the appellee that had sustained no detriment to support contractual release by way of the satisfaction of the judgment against the railroad, and no intention to release appellee can be found from the facts here.

In *Gronquist vs. Olson*, 242 Minn. 119, 64 NW (2d) 119 (1954), in holding on a similar situation, said:

> "We believe that the factors determinative of whether a release of one of several joint tort-feasors will operate to release the remaining wrongdoers should be and are: (1) The intention of the parties to the release instrument, and (2) whether or not the injured party has *in fact received full compensation* (emphasis added) for his injury. If we apply that rule, then where one joint tort-feasor is released, regardless of what form that release may take, as long as it does not constitute an accord and satisfaction or an unqualified, or absolue release, and there is no manifestation of any intention to the contrary in the agreement, the injured party should not be denied his right to pursue the remaining wrongdoers until he has received full satisfaction. * * * How can the appellant complain of the other party jointly liable has paid part of the dam-

> ages? He has not been prejudiced by the settlement, but on the contrary has been benefited for he is entitled to have the amount of the judgment reduced by the amount paid by his co-tort-feasor."

State vs. Sims, 139 W.V. 92, 79 S.E. (2d) 277, holds that a judgment against one of several tort-feasors must be fully satisfied to constitute a bar against another joint tort-feasor, and in the opinion said, at page 291:

> "A judgment against one joint trespasser is no bar to a suit against another for the same trespass; nothing short of full satisfaction, or that which the law must consider as such, can make such a judgment a bar."

And at page 292

> "The rule prevailing in this jurisdiction that a judgment against one joint tort-feasor is not a bar to a suit against another joint tort-feasor for the same tort, and *nothing short of full satisfaction* (emphasis added), or that which the law must consider as such, can make the judgment a bar to a subsequent action, is, in our opinion, just and reasonable, and is supported by the great weight of authority in the United States."

In *Valles vs. Union Pacific Railroad Company*, 72 Ida. 231, 238 Pac. (2d) 1154, the Idaho Supreme Court said:

> "It is a well settled rule that before one joint tort-feasor can be held to be discharged from liability through the release of another, the consideration for such release must have been *accepted by the plaintiff in full satisfaction* (emphasis added) of the injury."

There is nothing that will support the position that appellant accepted the settlement from the railroad in full satisfaction of the judgment on his claim against the ap-

pellee. While the adequacy of damage award may create issue in subsequent action against concurrent or joint tort-feasor, prior partial payment of a judgment will not be a bar to the action. *Black vs. Martin*, 88 Mont. 256, 192 Pac. 577 (1930).

The District Judge here had previously decided, *Viehweg vs. Mountain States Tel. & Tel. Co.*, 141 F. Supp, 846 U.S.D.C. Ida., 1956), and held by his order (T.R. 24) that the instant case falls within the *full satisfaction* rule of that case. The two cases are distinguished, however, by the records showing that in the Viehweg case there was *full* satisfaction of the judgment in fact, and in the McPherson case there was not *full* satisfaction of the judgment in fact. This vital distinction is the crux of the reason why appellant still has a valid cause against appellee and his case was improperly dismissed.

B.

The appellee's motion to dismiss was improperly granted for the reasons stated in the foregoing portion of this brief, however, there has been additional error in dismissing the action when procedurally the motion to dismiss was treated as one for summary judgment under Rule 12 (b) of the Federal Rules of Civil Procedure.

The appellee asked the court to treat its motion to dismis under Rule 12 (b) as a motion for summary judgment as if under Rule 56, and submitted the affidavit of Dale Clemons with exhibits "A" to "F" inclusive, attached thereto (T.R. 8 to 22 inc.), and the court treated the motion as one for summary judgment. (T.R. 22-25 But by his

judgment (T.R. 25-26), the court dismissed the action with prejudice, whereas Rule 56 requires that the court should determine whether the complaint, the affidavit, and exhibits showed there was no genuine issue as to any material fact and that the moving defendant was entitled to judgment as a matter of law. This is error, and has so been ruled by this Ninth Circuit Court.

Mantin vs. Broadcast Music, Inc., 248 F. (2d) 530 (C.A. 9, 1957), appears to be in point with the instant case concerning the erroneous procedure, and indicates the need for its reversal. In holding that where a motion for dismissal for failure to state claim on which relief can be granted, matters outside the complaint were presented to, and considered by the court, determination must be made as to whether the complaint and other matters considered show any genuine issue as to any material fact, and whether the moving defendant is entitled to judgment as a matter of law, the court said:

> "The motion * * * was * * * to dismiss the action for failure of the complaint to state a claim upon which relief could be granted. On this motion matters outside the complaint were presented to and not excluded by the District Court. Therefore the District Court was required by Rule 12 (b) to treat the motion as one for summary judgment; dispose of it as provided in Rule 56; give plaintiff and the moving defendants reasonable opportunity to present all matters made pertinent to such a motion by Rule 56; thereupon determine whether the complaint, the depositions, if any, the admissions, if any, the affidavits of Kirby and Janssen and the other affidavits, if any,

showed that, as between plaintiff and the moving defendants, there was no genuine issue as to any material fact, and that the moving defendants were entitled to a judgment as a matter of law; if so, render such judgment forthwith; and if not, deny the motion."

"Instead of doing what Rule 12 (b) required, the District Court treated the motion as nothing but a motion to dismiss the action for failure of the complaint to state a claim upon which relief could be granted and, so treating the motion, granted it and entered the judgment here appealed from—a judgment dismissing the action for failure of the complaint to state such a claim. This was in error."

"Judgment reversed and case remanded for further proceedings in conformity with this opinion."

Thus the District Court here erred in failing to render judgment under Rules 12 (b) and 56, and by dismissing the action, and the judgment of dismissal should be by this Circuit Court reversed.

DATED at Boise, Idaho, June 13, 1959.

Respectfully submitted,

BRUCE BOWLER
244 Sonna Building
Boise, Idaho

Attorney for Appellant

Due service and receipt of 3 copies of the foregoing

Appellant's Brief is hereby admitted this.....day of June, 1959.

CLEMONS, SKILES & GREEN

By.....

Attorneys for Appellee